

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SEBASTIAN WELLS ATRYZEK, :
Plaintiff, :
v. : C.A. No. 18-178WES
JUDITH CROWELL, :
Defendant. :

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

On April 5, 2018, Plaintiff Sebastian Wells Atryzek, an inmate at the Adult Correctional Institutions (“ACI”), filed a *pro se* civil rights complaint¹ alleging ineffective assistance of counsel against Judith Crowell, a private attorney who acted as Plaintiff’s defense counsel in connection with two or more state criminal cases charging him with failure to register as a sex offender. ECF No. 1 at 1. The complaint seeks an award of \$1 million in damages. ECF No. 1 at 7. Along with his complaint, Plaintiff filed a motion for leave to proceed *in forma pauperis* (“IFP”), ECF No. 2, which has been referred to me for determination. Because of the IFP motion and Plaintiff’s status as a prisoner, this case is subject to mandatory *sua sponte* preliminary screening under 28 U.S.C. §§ 1915(e)(2) and 1915A. For the reasons that follow, I recommend that Plaintiff’s complaint be summarily dismissed based on its failure to state a claim upon which relief may be granted.

Plaintiff’s complaint is brought pursuant to 42 U.S.C. § 1983. It alleges that, before he pled *nolo contendere* to the state failure-to-register charges, his criminal defense attorney (Judith

¹ Because Plaintiff is *pro se*, I have employed a liberal construction of his filing. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Instituto de Educacion Universal Corp. v. U.S. Dep’t of Educ., 209 F.3d 18, 23 (1st Cir. 2000).

Crowell) failed to advise him that he did not have a duty to register nor did she file the appropriate motion to dismiss the charges. ECF No. 1 at 2-3. Accordingly, he claims, Attorney Crowell “provided plaintiff with counsel that was constitutionally deficient by allowing plaintiff to plead to failure to register charge(s) even though plaintiff had no duty to register.” ECF No. 1 at 5. He asks the Court to grant his ineffective assistance of counsel claim and to award him \$1 million dollars in damages. ECF No. 1 at 5, 7.

The legal standard for dismissing a complaint for failure to state a claim pursuant to §§ 1915(e)(2) and 1915A is the same as used when ruling on a Rule 12(b)(6) motion to dismiss. Hodge v. Murphy, 808 F. Supp. 2d 405, 408 (D.R.I. 2011). To survive a motion to dismiss, a complaint must contain sufficient factual allegations to “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Iqbal, 556 U.S. at 678.

While a claim of ineffective assistance of counsel may be a proper basis for collateral attack on a conviction,² it generally does not work as the foundation for a civil damage claim in federal court based on 42 U.S.C. § 1983. Section 1983 is limited to claims against a “person who, acting under color” of state law transgresses rights secured by the Constitution. 42 U.S.C. § 1983. Attorney Crowell is a private citizen, not a state actor; therefore, any claim against her under § 1983 cannot be viable. See Polk Cty. v. Dodson, 454 U.S. 312, 324 (1981) (public defender does not act under color of state law); Tierney v. Town of Framingham, 292 F. Supp. 3d 534, 541 (D. Mass. 2018) (“It is well-settled that a lawyer (even a court-appointed one) does

² Plaintiff’s post-conviction petition making the same claim of ineffective assistance by Attorney Crowell is currently pending before the Rhode Island Supreme Court. Atryzek v. State, No. 2016-162-M.P.

not act under the color of state law in performing a lawyer’s traditional function as counsel to a party.”) (quoting Aldrich v. Ruano, 952 F. Supp. 2d 295, 201 (D. Mass. 2013)); Murphy v. Maine, C.A. No. 06-062-ML, 2007 WL 2428816, at *2 (D.R.I. Aug. 22, 2007) (“[I]t is well-established that private attorneys are not state actors”). Further, if Plaintiff were to alter his claim to one seeking damages for legal malpractice, it would still be subject to dismissal because such a claim arises under state law and this Court lacks subject matter jurisdiction over a state law claim between two individuals, both of whom are citizens of Rhode Island. 28 U.S.C. § 1332(a). Finally, to the extent that Plaintiff’s damages are based on his allegation that he has been convicted for a “baseless charge,” ECF No. 1 at 3, the complaint is independently subject to dismissal because a § 1983 action that essentially challenges the validity of the underlying conviction cannot be sustained in accordance with Heck v. Humphrey, 512 U.S. 477, 489 (1994), which holds that a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 until the conviction or sentence is reversed, expunged, invalidated, or impugned by grant of habeas corpus. See Rodriguez v. Carhart, 73 F.3d 355 (1st Cir. 1996) (Table) (dismissing § 1983 claim against defense attorney and others that essentially challenges validity of underlying conviction) (citing Heck, 512 U.S. at 489); Boyd v. Biggers, 31 F.3d 279, 283 (5th Cir. 1994) (per curiam) (dismissing § 1983 claim that defendants had conspired to convict civil action plaintiff by providing ineffective assistance of counsel) (citing Heck, 512 U.S. at 489).

Based on the foregoing, I recommend that the complaint be summarily dismissed because it fails to state a claim upon which relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). I do not recommend that Plaintiff be given leave to file an amended complaint. See Brown v. Rhode Island, 511 F. App’x 4, 5-7 (1st Cir. 2013).

Consistent with this recommendation, I further recommend that the IFP motion be denied as moot.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
June 13, 2018